

SUMMARY OF RESPONSE

Respondent denied discriminating against Complainant because of her disability. Respondent denied that Complainant is an individual with a disability. Respondent admitted Complainant requested the reasonable accommodation that she be permitted to retain a dog as an emotional support animal despite Respondent's no dog policy. Respondent admitted to sending letters to Complainant which advised her she was in violation of Respondent's rules and regulations and was not permitted to harbor a dog in her unit. Respondent claimed to have taken no adverse action against Complainant, as it has allowed her to keep the dog and has not imposed fines or otherwise limited Complainant's use of the common areas.

BACKGROUND

Gary LoCassio is the Acting Director of the Division on Civil Rights (Director) and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

Respondent is the governing association of 110 residential and 5 professional units located in Hackensack, Bergen County, New Jersey.

Complainant resides in a residential condominium unit governed by Respondent. She has lived at the complex for over 25 years.

Complainant also sought the assistance of the Fair Housing Council of Northern New Jersey in making her request for reasonable accommodation. The Fair Housing Council of Northern New Jersey (Fair Housing Council) is a non-profit corporation located in Hackensack, Bergen County, New Jersey. The Fair Housing Council filed a separate complaint pertaining to this matter, with docket number HB23MT-61706, based upon its attempts to assist Complainant.

SUMMARY OF INVESTIGATION

The investigation revealed sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complainant based upon her disability when Respondent denied Complainant's request for reasonable accommodation. The investigation found sufficient evidence that Complainant requested that Respondent grant an exception to its no dog policy to allow her to retain her dog in her unit as an emotional support animal to ameliorate the effects of her disability, and provided medical support for her request, and that Respondent denied that request without establishing that granting Complainant's request would impose an undue hardship.

In the Verified Complaint, Complainant identified her disability as dysthymic disorder, also known as dysthymia. This psychological condition is defined by the American Psychiatric Association as:

depressed mood most of the time for at least two years, along with at least two of the following symptoms: poor appetite or overeating; insomnia or excessive sleep; low energy or fatigue; low self-esteem; poor concentration or indecisiveness; and hopelessness.

*...
Dysthymia is a serious disorder. It is not "minor" depression, and it is not a condition intermediate between severe clinical depression and depression in the casual colloquial sense. In some cases it is more disabling than major depression.¹*

The investigation disclosed that Paragraph 34 of Respondent's Rules and Regulations addresses the ownership of dogs. This section states, "No dogs (emphasis in original) on the premises." Visiting dogs are also not permitted in the building. The restriction only pertains to dogs; other animals, such as cats, are permitted.

There is no dispute that on or about September 24, 2009, Complainant submitted to Respondent a letter requesting permission to retain her dog as an emotional support animal. In this letter, Complainant stated she is the primary care giver for her aging parents who both have Alzheimer's disease. Complainant further stated in the letter that she was "coping emotionally with their rapid decline and facing their imminent passing," and that she was undergoing treatment for depression. Complainant continued that, "[o]n September 11, 2009 in desperation, coping with my feelings of loneliness and the need for companionship, I brought home a 2 lb. puppy along with a canine behavior counselor." Complainant stated that she was allergic to cats, which are allowed in the building. In her letter, Complainant described her dog, Benny, as having an "immediate therapeutic calming and spirit-lifting [e]ffect." She stated that she wanted to use the dog as therapy as this was preferable to antidepressant medication and bioidentical hormones (an alternative therapy), because of the unpleasant side effects of the pharmaceutical therapies. In addition, Complainant's letter stated that Benny does not bark and has been trained to relieve himself indoors. Complainant further stated that she would not walk Benny on Respondent's property, and she would carry Benny when traveling within the building.

Complainant submitted with her request a letter dated September 17, 2009, from Sue Zafarlotfi, PhD, of Hackensack Sleep and Pulmonary at the Medical Center. Dr. Zafarlotfi stated that Complainant is a patient under her care and requested that Respondent allow Complainant to have a puppy, as she is severely allergic to cats.

¹Information taken from <http://www.health.harvard.edu/newsweek/Dysthymia.htm> last visited on July 26, 2011.

Dr. Zafarlotfi stated, "this is clinically important in the treatment of depression and it relates to her therapy."

In response to Complainant's request, Respondent's attorney, Louis J. Verde, Esq., sent Complainant a letter dated December 22, 2009, requesting that Complainant's health care provider complete a certification describing Complainant's disability and need for an accommodation. Mr. Verde sent another copy of the letter dated January 8, 2010, with another copy of the certification.

Respondent was supplied with a certification from Ilona Anne Hress, L.C.S.W., dated January 22, 2010. In this certification, Ms. Hress identifies Complainant's disability as dysthymic disorder, which was diagnosed on November 17, 2006. Ms. Hress stated the dog would mitigate Complainant's feelings of hopelessness characteristic of dysthymia by providing companionship and unconditional regard for Complainant. Ms. Hress reported that since the dog requires constant attention and care, it helps Complainant to focus on a positive life-affirming activity instead of being pre-occupied with depressive thoughts and hopeless feelings. Ms. Hress also stated that Complainant had been treated with other therapies, such as biofeedback, bioidentical hormones, meditation, and psychotherapy, but with limited effect.

On January 28, 2010, Siobhan McGowan, Esq., an associate of Mr. Verde, sent Complainant a letter which confirmed receipt of the certification provided by Ms. Hress. Ms. McGowan stated the certification was forwarded to Respondent for review, but that she believed it to be insufficient to support Complainant's claim of a disability warranting an exemption to Respondent's rules and regulations. The letter advised Complainant that she would receive Respondent's response to her request within the next week, and that she remained in violation of Respondent's rules.

On February 4, 2010, Ronni Lee Seltzer, M.D., F.A.P.A., Diplomate of the American Board of Psychiatry and Neurology, of Englewood, New Jersey, completed another certification that was provided to Respondent. Dr. Seltzer wrote that she first diagnosed Complainant on January 25, 2002, and that Complainant suffered from major depressive disorder, dysthymic disorder, and sleep disorder. Dr. Seltzer stated that Complainant suffers from physical disabilities as well, including pain disorder, osteoarthritis, migraine headaches, and possible multiple sclerosis. Dr. Seltzer advised that Complainant experiences a markedly diminished interest and pleasure in most activities and interactions with others. Dr. Seltzer wrote that, "the symptoms of a major depressive episode cause Ms. Potash significant distress and impair her social and occupational functioning." Dr. Seltzer further stated in her certification that Complainant obtained a puppy to give purpose to her life. She reported that the one area of joy and comfort that Complainant experiences is in her interaction with Benny, which provides Complainant with a sense of warmth, unconditional acceptance, and companionship. Dr. Seltzer also stated that having the puppy has forced Complainant to be more physically active, which her depressive illness would typically have prevented. Dr. Seltzer further stated in the certification that this has helped improve Complainant's physical functioning ability. Dr. Seltzer stated that withdrawing the unconditional affection and companionship her dog provides

would put Complainant at a greater suicide risk and cause her mood to plummet, which would impact her work productivity and social interaction.

On April 14, 2010, Respondent's attorney, Ms. McGowan, sent Complainant a letter informing her of Respondent's decision regarding her accommodation request. The letter stated in pertinent part:

You are harboring a dog in your Unit and have requested that the Board waive its no dog policy. The Board has reviewed your request and considered all documentation submitted in support thereof. Based upon its review, the Board has determined to deny your request for a waiver of the Association's no dog policy. Accordingly demand is hereby made pursuant to the applicable provisions of the Governing Documents that you ensure that the dog be permanently removed from your Unit within thirty (30) days of the date of this letter. Failure to comply with this demand will result in the Association taking appropriate steps to enforce its Governing Documents, which may include, among other things, instituting a civil suit seeking specific performance of the Governing Documents. If any of the foregoing actions become necessary, you will be responsible to reimburse the Association for its costs, including attorney's fees.

Upon receiving the letter of denial, Complainant contacted the Fair Housing Council of Northern New Jersey for assistance. Fair Housing Council of Northern New Jersey (Fair Housing Council), is a non-profit corporation located in Hackensack, Bergen County, New Jersey. One of the Fair Housing Council's goals is to promote equal opportunity in housing. In that capacity, Jane Shinn O'Leary, Esq., of Fair Housing Council, sent a letter to Respondent's attorney McGowan requesting that Respondent reconsider and reverse its denial of Complainant's accommodation request. In response, Ms. McGowan sent a letter to Ms. O'Leary dated May 24, 2010, in which Respondent reaffirmed its decision to deny Complainant's reasonable accommodation request.

Following this denial, Dr. Seltzer sent another letter to Respondent dated, June 2, 2010. In this letter, Dr. Seltzer opined that Complainant meets the definition of a person with disabilities according to the Americans with Disabilities Act, Fair Housing Act, and the Rehabilitation Act of 1973. Dr. Seltzer stated Complainant's disabilities limit more than one major life activity. Dr. Seltzer further stated:

As a component of Ms. Potash's psychiatric treatment, which also includes psychotherapy and pharmacotherapy, I have recommended that Ms. Potash have an emotional support service animal to assist

her in coping with the symptoms imposed by her chronic and disabling illness. It is my professional opinion that an emotional support service dog will minimize Ms. Potash's suicidal risk, improve her functional capability and modify the intensity of her depressive and anxiety laden symptoms. This has been proven to be effective at the present time and will continue to be effective in the future.

Respondent did not respond to Dr. Seltzer's letter, and on June 29, 2010, Fair Housing Council's attorney O'Leary sent another letter to Respondent's attorney Ms. McGowan. In this letter, Ms. O'Leary stated that at Respondent's request Complainant's physician provided testimony certifying that Complainant has a disability, that the disability substantially limits one or more major life activities, and having a dog will assist in the treatment of her disability. Ms. O'Leary's letter warned that, based upon Respondent's continued denial of her reasonable accommodation request, Complainant had no alternative but to file a complaint of discrimination.

The investigation disclosed that on September 8, 2010, Respondent filed a complaint against Complainant in Superior Court of New Jersey, Law Division, Bergen County, Docket Number L-8578-10, in which Respondent sought to enforce the no dog policy and force the removal of Complainant's dog. On October 12, 2010, Complainant's attorney submitted to the Court a motion to dismiss the case based upon the filing of the instant complaint. The Superior Court case was dismissed without prejudice on this basis on December 3, 2010, by the Honorable Melanos W. Toskos, J.S.C.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

In the instant case, it appears undisputed that Complainant requested a reasonable accommodation in the form of a waiver of Respondent's "no dogs" policy to allow her to keep a dog in her unit as an emotional support animal, and that Respondent denied this request. The

investigation disclosed that Complainant provided Respondent with sufficient information to make a determination that Complainant suffers from a disability, and provided support from her medical providers outlining how the disability has affected Complainant and how maintaining the dog would assist in ameliorating the effects of her disability.

Respondent appears to contest whether Complainant suffers from a disability covered under the LAD. However, Complainant supplied Respondent with several certifications and letters from her medical providers outlining her diagnosis and how having an emotional support animal fits in her treatment plan. The LAD's definition of "disability" is broad and has been found to include depression and similar conditions. See Tynan v. Vicanage 13, 351 N.J. Super. 385 (App. Div. 2002); Olsen v. GE Astrospace, 966 F. Supp. 312, 315 (D.N.J. 1997).² In light of the certifications and letters provided by Complainant's medical providers outlining her diagnosis, there is sufficient evidence at this stage of the proceedings to establish that Complainant suffers from one or more disabilities under the LAD.

Pursuant to N.J.S.A. 10:5-4.1 and 10:5-12(g), it is unlawful for housing providers to discriminate in the terms, conditions, or privileges of a sale or rental of real property, or in the furnishing of facilities or services in connection therewith. The LAD's prohibition against disability discrimination in housing includes the refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling. N.J.A.C. 13:13-3.4(f)(2). Such accommodations may include waiver of a "no pets" rule when there is no showing of undue hardship on the part of the housing provider. See Oras v. Housing Authority of City of Bayonne, 373 N.J. Super. 302, 312, 317-18 (App. Div. 2004). In this case, Complainant and her medical providers have described how maintenance of Complainant's emotional support animal fits within her treatment plan. Additionally, Respondent has not demonstrated that allowing Complainant to maintain the dog would impose an undue hardship, particularly since (1) Respondent allows cats (to which Complainant is allergic); (2) Complainant's dog is small; and (3) Complainant has taken measures to minimize the dog's impact on the complex.

Respondent also argues that it has not taken any adverse action against Complainant, since she has been able to maintain the dog and has not been fined or otherwise penalized by Respondent. It does appear that Respondent has not actually forced removal of the dog or issued fines to Complainant. It has, however, specifically denied Complainant's request for an accommodation, which was accompanied by a threat of a lawsuit and imposition of Respondent's legal fees against Complainant. And Respondent ultimately followed through with this threat by filing a lawsuit in Superior Court, which was only dismissed without prejudice after Complainant filed the instant

² While Complainant's medical providers opined that Complainant's disabilities substantially limit more than one major life activity, the "substantially limiting" requirement is applicable only to the Americans with Disabilities Act (ADA) and not the LAD. The New Jersey Supreme Court has recognized that unlike the ADA, a condition need not be "severe" or "immutable" to constitute a disability under the LAD. Viscik v. Fowler, 173 N.J. 1, 16 (2002).

complaint with the Division. Thus, while Complainant still has the dog in her unit, she does so under a cloud of uncertainty as to whether the dog will be able to stay. The New Jersey Supreme Court recently suggested that a violation of the LAD can be established based on a failure reasonably accommodate or failure to engage in the interactive process in connection with an accommodation request, even if there is no further adverse consequence. See Victor v. State, 203 N.J. 383, 421 (2010). Consequently, the Director finds that Respondent's denial of Complainant's accommodation request could constitute a violation of the LAD even though Respondent may not have taken further adverse action against Complainant.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint.

8/1/11
Date

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Department of Law and Public Safety

